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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

In re Application of
WEST FACE CAPITAL INC.,
Applicant.

Case No. 19-mc-80090-LB

**ORDER GRANTING APPLICATION
TO SERVE REQUEST FOR
DISCOVERY FOR USE IN A FOREIGN
PROCEEDING**

Re: ECF No. 1

INTRODUCTION

West Face Capital Inc. is a defendant and counterclaimant in an action pending before the Ontario Superior Court of Justice in Toronto, Ontario, Canada.¹ West Face alleges that the counterclaim defendants in its Canadian action engaged in a campaign to defame it, including by making false and defamatory statements about it and its CEO in anonymous postings on various internet websites.² In an effort to establish that the counterclaim defendants were responsible for the anonymous statements, West Face filed an application under 28 U.S.C. § 1782 seeking leave to issue a subpoena to Google LLC for documents related to certain Gmail email addresses

¹ Appl. – ECF No. 1 at 2 (¶ 1). Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

² *Id.*

1 associated with the website on which the statements about West Face were made.³ Google does
2 not oppose West Face’s application.⁴ The court grants West Face’s application to serve its
3 proposed subpoena on Google.

4

5 ANALYSIS

6 **1. Governing Law**

7 West Face makes its application for discovery under 28 U.S.C. § 1782(a), which provides, in
8 relevant part:

9 The district court of the district in which a person resides or is found may order him
10 to give his testimony or statement or to produce a document or other thing for use
11 in a proceeding in a foreign or international tribunal, including criminal
12 investigations conducted before formal accusation. The order may be made
13 pursuant to a letter rogatory issued, or request made, by a foreign or international
14 tribunal or upon the application of any interested person and may direct that the
testimony or statement be given, or the document or other thing be produced,
before a person appointed by the court. . . . A person may not be compelled to give
his testimony or statement or to produce a document or other thing in violation of
any legally applicable privilege.

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16 A litigant in a foreign action qualifies as an “interested person” under Section 1782. *Intel*
17 *Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004). In order to apply for discovery
18 pursuant to Section 1782, a formal proceeding in the foreign jurisdiction need not be currently
19 pending, or even imminent. *Id.* at 258–59. Instead, all that is necessary is that a “dispositive
20 ruling” by the foreign adjudicative body is “within reasonable contemplation.” *Id.* at 259 (holding
21 that discovery was proper under Section 1782 even though the applicant’s complaint against the
22 opposing party was only in the investigative stage). An ex parte application is an acceptable
23 method for seeking discovery pursuant to Section 1782. See *In re Letters Rogatory from Tokyo*
24 *Dist.*, 539 F.2d 1216, 1219 (9th Cir. 1976) (holding that the subpoenaed parties may raise
25 objections and exercise their due process rights by bringing motions to quash the subpoenas).

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27 ³ *Id.* at 2 (¶ 3).

28 ⁴ *Id.* at 4 (¶ 8).

1 A district court has wide discretion to grant discovery under Section 1782. *Intel*, 542 U.S. at
2 260–61. In exercising its discretion, a district court should consider the following factors:
3 (1) whether the “person from whom discovery is sought is a participant in the foreign proceeding,”
4 (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the
5 receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial
6 assistance,” (3) whether the request “conceals an attempt to circumvent foreign proof-gathering
7 restrictions or other policies of a foreign country or the United States,” and (4) whether the request
8 is “unduly intrusive or burdensome.” *Id.* at 264–65.

9 A district court’s discretion is to be exercised in view of the twin aims of Section 1782:
10 (1) providing efficient assistance to participants in international litigation and (2) encouraging
11 foreign countries by example to provide similar assistance to our courts. *Schmitz v. Bernstein*
12 *Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004). There is no requirement that the party
13 seeking discovery establish that the information sought would be discoverable under the
14 governing law in the foreign proceeding or that United States law would allow discovery in an
15 analogous domestic proceeding. See *Intel*, 542 U.S. at 247, 261–63.

16 When considering an application for discovery pursuant to Section 1782, the court considers
17 first whether it has the statutory authority to grant the request and then whether it should exercise
18 its discretion to do so. *Lazaridis v. Int’l Centre for Missing and Exploited Children, Inc.*, 760 F.
19 Supp. 2d 109, 112 (D.D.C. 2011) (citations omitted).

20
21 **2. Application**

22 **2.1 Statutory Requirements**

23 West Face’s application satisfies the three minimum statutory requirements of Section 1782.
24 First, West Face’s application seeks discovery from Google, whose principal place of business is
25 in the Northern District of California. Second, the requested discovery is for use in a lawsuit
26 currently pending in Canada. Third, West Face qualifies as an “interested person” because it is a
27 party to the Canadian lawsuit.

1 **2.2 Discretionary *Intel* Factors**

2 The discretionary *Intel* factors also support granting the application.

3 **2.2.1 Participant in a foreign proceeding**

4 The first *Intel* factor asks whether the “person from whom discovery sought is a participant in
5 the foreign proceeding.” *Intel*, 542 U.S. at 264. If the person is a participant, “the need for
6 § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a
7 nonparticipant in the matter arising abroad” because “[a] foreign tribunal has jurisdiction over
8 those appearing before it, and can itself order them to produce evidence.” *Id.* “In contrast,
9 nonparticipants in the foreign proceeding may be outside the foreign tribunal’s jurisdictional
10 reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a)
11 aid.” *Id.*

12 Google is not a participant in the Canadian lawsuit. Additionally, Google, a resident of
13 California, may claim that the documents that West Face seeks are located in the United States and
14 not in Canada, and thus possibly out of the immediate reach of the Canadian court.⁵ This factor
15 weighs in favor of granting the application. *Cf. Thompson v. Doel*, No. 5:13-cv-80088-EJD-PSG,
16 2013 WL 5544607, at *2 (N.D. Cal. Oct. 7, 2013).

17 **2.2.2 Nature of the foreign tribunal and receptivity to U.S. federal-court judicial
18 assistance**

19 The second *Intel* factor requires the court to “take into account the nature of the foreign
20 tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign
21 government or the court or agency abroad to U.S. federal-court judicial assistance.” *Intel*, 542 U.S.
22 at 264.

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27 ⁵ Appl. – ECF No. 1 at 4 (¶ 7); Mem. of Law – ECF No. 2 at 7.

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1 The Canadian court expressly requested the assistance of this court in obtaining documents
2 from Google and thus appears receptive to U.S. federal-court judicial assistance.⁶ This factor
3 weighs in favor of granting the application.

4 **2.2.3 Attempt to circumvent foreign proof-gathering restrictions or policies**

5 The third *Intel* factor considers whether the request “conceals an attempt to circumvent foreign
6 proof-gathering restrictions or other policies of a foreign country or the United States.” *Intel*, 542
7 U.S. at 264–65.

8 The Canadian court expressly held that this application was not an attempt to circumvent
9 Canadian proof-gathering restrictions.⁷ This factor weighs in favor of granting the application.

10 **2.2.4 Undue intrusion or burden**

11 The fourth *Intel* factor is whether the request is “unduly intrusive or burdensome.” *Intel*, 542
12 U.S. at 265.

13 Google does not oppose West Face’s application, and the discovery West Face seeks does not
14 appear on its face to be unduly intrusive or burdensome. West Face further states that it is willing
15 to meet and confer with Google if Google believes that any of its requests are unduly
16 burdensome.⁸ This factor weighs in favor of granting the application. Cf. *In re Darmon*, No. 17-
17 mc-80089-DMR, 2017 WL 3283969, at *3 (N.D. Cal. Aug. 2, 2017) (finding that “proposed
18 subpoena [that] requests documents that establish or would help to establish the identity of the

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⁶ Appl. Ex. C (Canadian court order) – ECF No. 4-1 at 118 (“THIS COURT FURTHER REQUESTS
23 the assistance of the United States District Court for the Northern District of California in aiding the
24 Moving Parties in obtaining documents from Google by the means ordinarily used in that jurisdiction
25 to obtain documents from a non-party[.]”).

26 ⁷ *Id.* (Canadian court order) (“THIS COURT DECLARES that the documents to be sought by the
27 Moving Parties in the United States may be relevant and necessary to the just determination of the
28 Moving Parties’ Counterclaim in this Action, and the Moving Parties’ intent to seek production of
such documents in the United States is consistent with and not contrary to this Court’s continued
jurisdiction with respect to this Action and is not an attempt to circumvent the proof-gathering process
in Canada[.]”).

⁸ Appl. – ECF No. 1 at 4 (¶ 7); Mem. of Law – ECF No. 2 at 9.

1 author of the blog posts on Wordpress.com” “does not appear to be unduly burdensome and is
2 appropriately tailored”).⁹

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4 **CONCLUSION**

5 For the foregoing reasons, the court grants West Face’s application to serve its proposed
6 subpoena on Google.

7 If Google wants to contest the subpoena, it must notify West Face that it wishes to do so
8 before the return date of the subpoena. Then, in lieu of a formal motion to quash, the parties must
9 engage in the meet-and-confer and joint-letter-brief processes set out in the court’s standing order,
10 which is attached to this order.

11 West Face must serve Google with a copy of this order and a copy of the standing order when
12 it serves its subpoena.

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14 **IT IS SO ORDERED.**

15 Dated: April 15, 2019



16
17 LAUREL BEELER
18 United States Magistrate Judge

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⁹ This does not preclude Google from contesting the subpoena. *Cf. Darmon*, 2017 WL 3283969, at *4.